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JUL - 7 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act-
Competitive Bidding)

PP Docket No. 93-253

Amendment of the Commission's
Cellular PCS Cross-Ownership Rule)

GN Docket No. 90-314

Implementation of Sections 3(n) and 322
of the Communications Act)
Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

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COMMENTS OF K&M ENGINEERING AND CONSULTING CORPORATION

K&M Engineering and Consulting Corporation ("K&M") submits its comments in response to the Commission's Further Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding. In support thereof, the following is respectfully set forth.

K&M, an Hispanic-owned U.S. company, plans to participate in the Commission's auction for licenses in the C block ("C Block") for Personal Communications Services in the 2 GHz band. Under the Commission's existing rules, K&M qualifies as a small business controlled by minorities.

K&M supports the Commission's conclusion at this time to eliminate race and gender-based preferences in its competitive bidding rules for the C Block auction in light of the U.S. Supreme

Court's decision in *Adarand Constructors, Inc. v. Peña*.¹ K&M agrees with the Commission that delays, whether from the time required for further fact-finding to support the preferences or from legal challenges to the existing rules (which K&M agrees are likely), "would put the C block winners at a greater competitive disadvantage vis-à-vis existing wireless carriers such as cellular and enhanced SMR carriers, who have a substantial head start in the market."² Time is critical to the success of C Block winners, who will face at least five other competitors in the marketplace.

K&M is concerned, however, that elimination of the preferences without some adjustment to the size categories of the various entrepreneurs may adversely affect the minority and women-owned businesses who have invested time and money in planning to participate in the auction. The Commission notes that, according to 1987 U.S. Census Bureau Data, 99% of all women-owned businesses and 99% of all minority-owned businesses generated net receipts of \$1 million or less.³ Based on this data, minority- and women-owned businesses are *very small*. In K&M's view, minority- and women-owned businesses are disadvantaged in large part simply because they are *very small* and, for that reason, lack access to capital and the telecommunications industry. The practical effect of the elimination of the preferences is that these *very small* businesses must now compete with businesses which are significantly larger in size who will likely dominate the auction.

¹ 63 U.S.L.W. 4523 (U.S. June 12, 1995).

² Notice, p. 6 at para. 8.

³ Notice, fn. 39.

With respect to the Commission's proposed modifications to the rules relating to the installment payments and bidding credits, minority and women-owned businesses would, as a practical matter, compete with small businesses, which may have annual receipts of up to \$40 million (or, per the 1987 U.S. Census Bureau Data, up to 40 times the annual receipts of most minority- or women-owned businesses). These larger entities are permitted to use a control group to exclude the gross revenues and total assets of very large companies and institutional investors from the calculation of attribution pursuant to section 24.709 of the rules. The investment leverage available to these entities greatly exceeds that which is available to truly small businesses.

With respect to the Commission's proposed modifications to the rules relating to the control group minimum 50.1 percent equity option, all auction participants, rather than minority- and women-controlled participants, will now benefit from attribution rules designed to enhance the ability of minority- and women-owned businesses to attract larger investors. As stated above, the minority- and women-owned business is at a disadvantage in large part due to its very small size. The chances of such businesses attracting capital will be diminished if their larger competitors within the auction may also compete for the same investors.

The effect of the Commission's proposed modifications would be to eliminate the opportunity for the *very small business* (where most minority- and women-owned businesses lie) to compete and turn the C Block auction into one only for the larger participants within the auction. The Commission has the ability to comply with Congress' mandate to make opportunities available to women and minority controlled businesses, consistent with *Adarand*, by simply making two modest changes. First, for the purposes of the installment payments and bidding credits, small

businesses should be reclassified into two categories. The larger category, *small entrepreneurial business*, would include businesses with annual revenues between \$20 million and \$40 million. The smaller category, *very small business*, would include businesses with annual revenues up to \$20 million.

K&M suggests that its proposed category of *small entrepreneurial business* qualify for the proposed installment payment plan for the current category of "small businesses". That is, *small entrepreneurial businesses* would qualify for a 10-year payment plan with interest payable at the rate the U.S. Treasury Note rate plus 2.5%. Interest only would be payable during the first two years, with principal amortized over the remaining eight years.

K&M suggests that its proposed category of *very small business* be entitled to the payment plan which the FCC now proposes for all small businesses. That is, *very small businesses* would qualify for a 10-year payment plan with interest payable at the U.S. Treasury Note rate. Interest only would be payable during the first 6 years, with principal amortized over the remaining four years.

K&M proposes that a bidding credit of 10% be granted to its proposed category of *small entrepreneurial business* and that a bidding credit of 25% be granted to its proposed category of *very small business*. This would alleviate the harm which minority and women-owned businesses, most of which are very small businesses, may suffer as a result of the elimination of the preferences. For a summary of these changes, see attached EXHIBIT A, entitled Proposed Qualifications and Bidding Preferences for Entrepreneurial Entities.

Second, with respect to the control group minimum 50.1 percent equity option, K&M proposes that the preference previously granted to minority- and women-owned businesses be granted to K&M's proposed category of *very small businesses*. Alternatively, the Commission may want to consider granting the preference only to its existing category of "small business". These suggested changes, which are completely race and gender neutral, will as a practical matter, inure to the vast majority of minority and female controlled businesses without being subject to an *Adarand* challenge.

Finally, the regulations of the Small Business Administration ("SBA") support K&M's proposal to redefine "small business". The SBA regulations establish small business size standards, either by number of employees or annual receipts, by industry according to the Standard Industrial Classification (SIC) codes. Of the several hundred size standards based on annual receipts only a handful exceed \$20 million.⁴ K&M's proposal to redefine "small business" with a category for *very small businesses*, with annual receipts less than \$20 million, is consistent with the SBA's standards, using receipts as a measurement of size.

K&M has expended considerable resources in preparing for the auction and understands its competition. As a *very small business*, K&M counted on the installment payment plan and bidding credit preferences to "level the playing field" within the C Block auction. Without these advantages over its larger competitors in the auction, K&M's chances of success are significantly diminished.

⁴ 13 C.F.R. 121.601. See size standards for SIC codes 4619 (pipelines; \$25 million); 5511 (motor vehicle dealers (new and used); \$21 million); 6021, 6022, 6029, 6035, 6036, 6061, 6062, 6081, 6082 (certain types of depository institutions; \$100 million); 7812, 7819, 7822 (motion pictures; \$21.5 million).

K&M urges the Commission to consider dividing the category of "small business" for the purpose of installment payments and bidding credits and limiting the benefit of the attribution rules achieved in the control group minimum 50.1 percent equity option so that the goal of the C Block auction--to open competition in personal communications services to *all* small businesses--is preserved.

Respectfully submitted,

K&M ENGINEERING AND CONSULTING
CORPORATION

By: 

Adolfo Menéndez
President

July 7, 1995

**PROPOSED
QUALIFICATIONS and BIDDING PREFERENCES
FOR ENTREPRENEURIAL ENTITIES**

| <u>ENTREPRENEURS</u> | <u>BIDDING CREDITS</u> | <u>INSTALLMENT PAYMENTS</u> |
|--|------------------------|---|
| | 0-25% as follows: | Principle and interest payable over 10 years as follows: |
| <u>ENTREPRENEURS</u> Revenue less than \$125 MM and less than \$500 MM in total assets) | | |
| Large Entrepreneurial Business Revenues* between \$75 MM and less than \$125 MM | 0 | Principle and interest amortized over 10 years; with interest payable at the rate of 10 yr. U.S. Treasury Notes plus 3.5% |
| Intermediate Entrepreneurial Business Revenues* between \$50 MM and less than \$75 MM | 0 | Interest only for 1 years; Principle amortized over 9 years; with interest payable at the rate of 10 yr. U.S. Treasury Notes plus 2.5% |
| Small Entrepreneurial Business Revenues* between \$25 MM and less than \$50 MM | 10% | Interest only for 2 years; Principle amortized over 8 years; with interest payable at the rate of 10 U.S. Treasury Notes plus 2.5% |
| Very Small Business Revenues* of less than \$25 MM | 25% | Interest only for 6 years; Principle amortized over 4 years; with interest payable at the rate of 10 yr. U.S. Treasury Notes |

NOTE: The term "revenues" as used here, includes the revenues of the applicant, attributable investors and their respective affiliates.